



In addition, respondent argues claimant failed to prove he provided timely notice of his accident as there are numerous potential dates the accident allegedly occurred. Finally, respondent argues the Judge exceeded his jurisdiction by awarding workers compensation benefits for an injury or condition that is not compensable under the Workers Compensation Act. In short, respondent requests the Board to deny claimant's request for benefits.

Claimant argues the Board should affirm the preliminary hearing Order as he injured his back on March 12, 2008, and notified his supervisor the same day. Claimant also alleges he notified one of respondent's owners about his back injury on March 17, 2008, which is well within the 10-day notice period provided by the Workers Compensation Act.

The only issues before the Board on this appeal are:

1. Did claimant injure his back in an accident arising out of and in the course of his employment with respondent?
2. If so, did claimant provide respondent with timely notice of his accident or injury as required by K.S.A. 44-520?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date, the undersigned Board Member finds and concludes:

Claimant began working for respondent in 2007 as a track hoe operator. Respondent is owned by Whitaker Companies, which in turn is owned by Curt and Sandra (Sandy) Whitaker. Claimant's primary job was to load rock into trucks for delivery to a local cement plant. At other times claimant might operate a bulldozer, drive a 50-ton truck, or work at the ranch owned by respondent's owners.

Claimant contends that in early 2008 he was unloading and cutting heavy pipe for two or three days at the ranch when he began experiencing pain in the middle and lower part of his back.<sup>2</sup> Claimant believed the date was March 12, 2008. He testified at his March 18, 2009, preliminary hearing that he believed he told his supervisor, Gene Laver, about his back complaints the same day those symptoms began and that he had hurt himself with the pipe. But at his earlier deposition, which was held in September 2008, claimant testified he told Mr. Laver his back was hurting but that he did not tell Mr. Laver

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<sup>2</sup> P.H. Trans. at 11.

what was causing it to hurt. But claimant then testified at his deposition that he may have told Mr. Laver he had injured himself earlier that day. Claimant testified, in part:

Q. (Mr. Donley) Okay. Did you tell Mr. Laver that your back was hurting?

A. (Claimant) Yeah, he said I needed to get it checked out.

Q. Okay.

A. He said he would say something to Sandy about it.

Q. All right. Did you tell him what was causing your back to hurt?

A. No.

Q. Did you tell Mr. Laver that you had injured yourself the morning of March 12, 2008?

A. I might have mentioned something.<sup>3</sup>

Nevertheless, at both his deposition and his preliminary hearing claimant testified his back symptoms began in the morning and that after lunch that day he was traveling to Chanute with Mr. Laver when he made Mr. Laver pull to the side of the road so he could adjust the way he was sitting in the truck to relieve his back, which had become very uncomfortable. Claimant thought that trip to Chanute with Mr. Laver was later the same day he had been handling pipe and the day he first began experiencing low back symptoms. Claimant also testified that within five days of when he began experiencing back symptoms he told Sandy Whitaker he had done something to his back lifting pipe.

Claimant's back symptoms would wax and wane. In May 2008, Ms. Whitaker sent claimant to a chiropractor, Dr. Nathan R. Falk, that respondent occasionally used. The medical records from Dr. Falk's office indicate claimant was complaining of moderate and intermittent lower back pain and spasm. The doctor recorded the following history:

The onset of the symptoms has been rather sudden. The date of onset was 04/01/08. The pain subsided for about 5 weeks and was occasional, until about 1 week ago when the pain increased and became frequent. Mike [claimant] states that the problem is most evident as a result of bending over. He can sit, stand, walk and sleep without discomfort. The patient says the problem started while riding with co-workers in a truck on their way home after work almost 6 weeks ago, but the

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<sup>3</sup> Knavel Depo. at 31.

patient denies any incident, accident or trauma. He has not seen any other doctors for this condition.<sup>4</sup>

Claimant testified that history was incorrect as he believed it was an inaccurate description of when he was riding with Mr. Laver and asked him to pull to the side of the road.

Despite his low back symptoms claimant continued working for respondent. On June 8, 2008, claimant left work early to go to a local emergency room as his back symptoms had worsened to the point he could hardly walk. At the emergency room claimant was given injections and told to follow up with his family physician. The next day, June 9, 2008, Mr. Whitaker told claimant he was no longer needed.

Claimant applied for unemployment benefits and was asked to provide a Health Care Provider's Certification form, which claimant took to his family doctor. That form, which appears to have been completed by a physician assistant, stated "He [claimant] states that he has pain from the bouncing of loader while operating."<sup>5</sup> The form, which was completed on June 17, 2008, also indicates that claimant indicated he became unable to work on June 9, 2008.

The earliest medical record in evidence at this juncture that records a history that claimant injured his back lifting at work is dated June 16, 2008, when claimant was seen at his family physician's office. That history reads:

Low back pain noted. The discomfort is most prominent in the lower lumbar spine. He characterizes it as constant, severe, and sharp. This is an acute episode with no prior history of back pain. He states that the current episode of pain started 2 months ago. The event which precipitated this pain was lifting heavy objects. This occurred at work. . . .<sup>6</sup>

But the history recorded for claimant's July 15, 2008, visit at his family doctor's office actually states claimant's back symptoms were from lifting heavy pipe five months earlier. Those medical notes read, in part:

Mr. Knavel presents with low back pain. The discomfort is most prominent in the right, mid lumbar spine. This radiates to the leg bilateral. He characterizes it as constant, moderate in intensity, dull, aching, and occ sharp stabbing. This is an acute episode with no prior history of back pain. He states that the current episode

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<sup>4</sup> P.H. Trans., Resp. Ex. 1.

<sup>5</sup> *Id.*, Resp. Ex. 2.

<sup>6</sup> *Id.*, Cl. Ex. 1.

of pain started 5 months ago. The event which precipitated this pain was lifting heavy Pipe. This occurred at work. He notes some pain relief with rest. The pain worsens with back flexion and twisting movements.<sup>7</sup>

Claimant's attorney hired Dr. Lynn A. Curtis to examine and evaluate claimant. The doctor examined claimant on September 3, 2008. The history that Dr. Curtis took from claimant is also somewhat different from the above. Dr. Curtis wrote, in part:

Mr. Knavel states that on 03/12/08 he was lifting pipes, which were 40 feet long and 6 inches in diameter, weighing 700-800 lb. Three people were lifting the pipes to load them. After doing the lifting, he then drove in a truck to Chanute, Kansas. He states he had to have the truck pull over because of back spasms.

The pain then gradually got worse with low back pain. He told his Supervisor, who was driving that day to Chanute, Kansas about the pain. He then talked to the contact person, or "Sandy", which worked for Whittaker [sic] Construction. This was on 03/28/08. He told her he was still hurting with low back pain. She told him to "wait another month".<sup>8</sup>

On January 14, 2009, claimant was examined by Dr. Joseph F. Galate. The history recorded by Dr. Galate indicates claimant initially injured himself on March 12, 2008. The doctor also noted that claimant denied any particular incident occurring that day but that claimant had stated he had been bending over and lifting cast iron pipes several days before.

Mr. Whitaker testified by deposition. He does not disagree that claimant unloaded and handled pipe at his ranch when the cement plant was temporarily shut down. But he does not believe claimant handled pipe on March 12, 2008, as claimant's time records show that he was driving a truck and stripping overburden at a quarry on that date. According to Mr. Whitaker, none of claimant's time records indicate he was building pipe during the period in question. Mr. Whitaker thought claimant may have been building pipe in January 2008 as the time records from the week of January 13 to 19, 2008, indicate claimant was performing shop maintenance and the rest of the records that Mr. Whitaker reviewed showed claimant was stripping overburden.<sup>9</sup> Mr. Whitaker, however, indicated the time records may not always be accurate as it has been a challenge to get the employees to put enough detail on their time records to determine exactly what they were doing on a particular day. In any event, Mr. Whitaker indicated he would like to review

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<sup>7</sup> *Id.*, Resp. Ex. 3.

<sup>8</sup> *Id.*, Cl. Ex. 4 at 1, 2.

<sup>9</sup> Whitaker Depo. at 18.

other employees' time records for March 12, 2008, to determine the accuracy of claimant's time records for that day.<sup>10</sup>

In addition, Mr. Whitaker believed he remembered his wife and Mr. Laver "talking [claimant] had complained of an issue,"<sup>11</sup> but he thought that was more like in January or February 2008. Similarly, Mr. Whitaker challenges claimant's description of the weight and size of the pipes that claimant was handling. According to Mr. Whitaker, the pipes are smaller and lighter.

Claimant is a poor historian. In addition, the evidence establishes that when claimant's symptoms began they would wax and wane but they did not prevent him from working. As the symptoms progressed, however, claimant encountered increased difficulty working. Accordingly, the very nature of the symptoms would account for some of the confusion about their source. Judge Klein observed claimant testify and implicitly found him credible. The undersigned affirms the Judge's finding that it is more probably true than not that claimant injured his back working for respondent and that such accidental injury arose out of and in the course of claimant's employment with respondent.

The Workers Compensation Act provides that, unless there is just cause, a worker has 10 days to provide the employer with notice of a work-related accident. It is unnecessary, however, to provide notice when the employer already has "actual knowledge" of the accident.<sup>12</sup>

Although there is a question when claimant actually handled the pipe at the Whitaker ranch, the undersigned finds claimant's testimony credible that he began experiencing back symptoms as a result of that work and that he provided notice to respondent within approximately five days when claimant spoke with Sandy Whitaker about his back symptoms. What is more, the undersigned finds respondent had notice that claimant sustained a work-related back injury when he complained of back discomfort and made Mr. Laver pull to the side of the road while they were on their way to Chanute. Claimant testified that he believed that trip to Chanute occurred on the same day that he was handling pipe at the Whitaker ranch. That testimony is presently uncontradicted. Consequently, respondent's knowledge that claimant was lifting and handling pipe that morning and that shortly after lunch he was experiencing such back discomfort that it required his supervisor, Mr. Laver, to pull to the side of the road comprises knowledge of a work-related accident and injury. For those reasons, whether claimant injured his back

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<sup>10</sup> *Id.*, at 39.

<sup>11</sup> *Id.*, at 8.

<sup>12</sup> K.S.A. 44-520.

lifting pipe in January, February, or March 2008, respondent had timely notice of the accident.

In conclusion, the March 20, 2009, Order should be affirmed as the evidence establishes that claimant more likely than not injured his back in an accident that arose out of and in the course of his employment with respondent and that he provided respondent with timely notice of that accidental injury.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>13</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**WHEREFORE**, the undersigned Board Member affirms the March 20, 2009, preliminary hearing Order entered by Judge Klein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June, 2009.

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KENTON D. WIRTH  
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant  
P. Kelly Donley, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge

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<sup>13</sup> K.S.A. 44-534a.